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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1978
No. 78-119

State of Washington, Department of Fisheries
and DONALD W. MOOS, ITS DIRECTOR,
Petitoners,

vs.

UNITED STATES OF AMERICA,
Respondents,

MAKAH TRIBE, LOWER ELWHA BAND OF CLALLAM TRIBE, PORT GAMBLE BAND OF CALLAM TRIBE, SUQUAMISH TRIBE, LUMMI TRIBE, NOOKSACK TRIBE, and SWINOMISH INDIAN TRIBAL COMMUNITY,
Intervenors-Respondents.

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES,
Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DENNIS C. KARNOPP

Counsel for Intervenor-
Respondents

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INDEX OF CONTENTS

STATEMENT OF FACTS	1
REASONS FOR DENYING WRIT	5
CONCLUSION	10

INDEX OF APPENDIX

"A Plan for Managing Fisheries on Stocks Originating from the Columbia River and its Tributaries above Bonneville Dam."	A-1

INDEX OF AUTHORITIES

Table of Cases:

Department of Game v. Puyallap, 414 U S 44 (1973)	5
Puyallap Tribe v. Department of Game, 381 U S 392 (1968)	5
Puyallap Tribe v. Department of Game, 433 U S 165 (1977)	5
Tulee v. Washington, 315 U S 681 (1942)	5
United States v. Olander	7
United States v. Oregon, 302 F Supp 899 (D Or 1969)	2,4, 9
United States v. Oregon, 529 F2d 570 (9th Cir 1976)	3
United States v. Washington, 384 F Supp 312 (W D Wa 1974), aff'd 520 F2d 676 (9th Cir 1975), cert den 423 U S 1086 (1976)	2,3, 5,6,7, 9
United States v. Winan, 198 U S 371 (1905)	5

Table of Treaties:

Treaty with the Tribes of Middle Oregon, June 25, 1855 12 Stat 96	2
Treaty with the Yakima Tribe, June 9, 1855 12 Stat 951	2
Treaty with the Umatilla Tribe, June 9, 1855 12 Stat 945	2
Treaty with the Nez Perce Tribe, June 11, 1855 12 Stat 957	2

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STATEMENT OF FACTS

The decision of the United States Court of Appeals for the 9th Circuit which the state of Washington seeks to have reviewed by this Court involved

five separate cases. Three of those cases (Nos. 77-3129, 77-3654 and 77-3655) arose from decisions of the United States District Court for the Western District of Washington under its continuing jurisdiction in the "Puget Sound case," United States v.Washington, 384 F Supp 312 (W D WA 1974), 520 F2d 676 (9th Cir 1975), cert den 423 U S 1086 (1976) and two of the appeals (Nos. 77-3208 and 77-3209) arose from decisions of the United States District Court for the District of Oregon under its continuing jurisdiction in the "Columbia River Case," United States v. Oregon, 302 F Supp 899 (1969). The state of Washington is a party defendant in both District Court cases and the Confederated Tribes of the Warm Springs Reservation of Oregon is a party only to the Columbia River case.

United States v. Oregon, 302 F Supp 899 (D Or 1969) was originally brought by the United States as plaintiff with only the state of Oregon as defendant and the four treaty tribes, the Warm Springs, (Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 96); Yakima, (Treaty with the Yakima Tribe, June 9, 1855, 12 Stat. 951); Umatilla (Treaty with the Umatilla Tribe, June 9, 1855, 12 Stat. 945); and Nez Perce (Treaty with the Nez Perce Tribe, June 11, 1855, 12 Stat. 957) as intervenors. In that decision the District Court upheld the off-reservation treaty fishing rights of the intervenor tribes in the Columbia River and decreed that the state agencies managing the runs of anadramous fish in the Columbia River must provide the

Tribes with the opportunity to take a "fair share" of any harvestable surplus of any run of anadramous fish destined for the Tribes' usual and accustomed fishing grounds and stations along the Solumbia River. Oregon did not appeal that decision.

The District Court for the District of Oregon retained continuing jurisdiction and during the next several years there were many additional hearings in the case. In each instance but one (where the Court reversed itself eight days later) the United States and the intervenor Tribes prevailed and relief was granted. The state of Oregon did not appeal any of these orders.

Following the decision in the United States District Court for the Western District of Washington in United States v. Washington, supra, the state of Washington intervened as a party defendant in the Columbia River case and the District Court for Oregon decreed that the treaty Indians should have the opportunity to harvest 50% of the harvestable surplus of the 1974 run of spring chinook destined for their usual and accustomed fishing grounds. Both Oregon and Washington appealed that order and the Court of Appeals for the 9th Circuit affirmed the decision on January 28, 1976. United States v. Oregon, 529 F2d 570 (9th Cir 1976) Neither defendant state sought review in this Court.

The controversy continued for several years. Finally, at the urging of the Honorable Robert J. Belloni of

the District Court for the District of Oregon the parties to the Columbia River case entered into intensive and difficult negotiations and finally arrived at an agreement which was incorporated in a "Plan for Managing Fisheries on Stocks Originating from the Columbia River and its Tributaries above Bonneville Dam". (A-1) This Plan was accepted and signed by the governors of the states of Oregon and Washington and the leaders of the four intervenor tribes as well as the United States and was approved and adopted by Court order of February 28, 1977. This plan does not strictly follow the court interpretations of the extent of the treaty fishing rights, but reflects a compromise accepted by all parties.

Since the adoption of this plan, the situation with regard to Columbia River Fisheries has become much less antagonistic and controversial. It has not been necessary for the District Court to review nearly every action of the state fisheries agencies, as was previously the situation. The present appeals arose from an order of the District Court for Oregon enforcing the provisions of the plan (No. 77-3209) and from a petition for writ of prohibition or mandamus by non-Indian fishing interests challenging the terms of the plan (No. 77-3208). All of the parties to United States v. Oregon, resisted the challenge to the Oregon District Court's orders in the 9th Circuit except Washington which took the extraordinary position that it had no authority to agree to the compromise settlement which the governor and Attorney General signed

in 1977 and which became a stipulated order of the Court. The state of Oregon not only has never appealed to this Court for review but advocated the position adopted by the 9th Circuit in these cases.

REASONS FOR DENYING WRIT

As this Court is well aware and as the 9th Circuit has frequently pointed out the controversy over the recognition of these treaty fishing rights of the Indian tribes of the Pacific Northwest is rivaled only by the controversy over some of the desegration cases.

Washington has a long history of refusing to recognize treaty Indian fishing rights. Many of the leading cases in this Court involved Washington's contention that the treaty created no special rights for the Indian. United States v. Winans, 198 U S 371 (1905), Tulee v. Washington, 315 U S 681 (1942), Puyallup Tribe v. Department of Game, 381 U S 392 (1968), Department of Game v. Puyallup Tribe, 414 U S 44 (1973), Puyallup Tribe v. Department of Game, 433 U S 165 (1977).

During the long history of the Puget Sound case, judges of the Ninth Circuit have repeatedly commented on Washington's attitude towards compliance with the law regarding treaty Indian fishing rights.

Speaking for the majority in U.S. v. Washington, 520 F2d 676, 685 (9th Cir 1975 Choy, Circuit Judge said:

"In treating treaty Indian fishermen no differently from other citizens of the state, the state has rendered the treaty guarantees nugatory."

In the same case, Burns District Judge, concurring, added this insight from the viewpoint of a District Judge:

"I deplore situations that make it necessary for us to become enduring managers of the fisheries, forests, and highways, to say nothing of school districts, police department and so on. The record in this case, and the history set forth in the Puyallap and Antoine cases, among others, make it crystal clear that it has been recalcitrance of Washington state officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the District Court. This responsibility should neither escape notice nor be forgotten." 520 F2d at 693.

This stubborn attitude was also apparent to the Court when it rendered the current opinion which Washington seeks to have reviewed. Goodwin, Circuit Judge, speaking for the majority said:

"Agencies of the State of Washington and various of its constituencies continue to attack the judgment in United States v. Washington. Accordingly, we will again set forth the treaty basis of

that decision and reaffirm its validity. The state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases (see Morgan v. Kerrigan, 530 F2d 401 (1st Cir.), cert. denied sub nom. McDonough v. Morgan, 426 U.S. 935, 96 S.Ct. 2649, 49 L.Ed2d 386 (1976); Morgan v. McDonough, 540 F2d 527 (1st Cir. 1976), cert. denied, 429 U.S. 1042, 97 S.Ct. 743, 50 L.Ed2d 755 (1977), the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice." 573 F2d at 1126

In the most recent appearance before the Ninth Circuit of cases arising out of U.S. v. Washington, in the United States of America v. Olander et al, consolidated appeals of contempt citations issued against non-treaty fishermen, in the opinion filed September 7, 1978, Circuit Judge Dunaway commented on Washington's attitude:

"All of these cases arise from the efforts of the United States District Court for the Western District of Washington to enforce its decree in United States v.

> Washington, W.D. Wash., 1974, 384 F. Supp 312, aff'd, 9 Cir. 1975, 520 F2d 676, cert. denied, 423 U.S. 1086. The district court, finding its decree opposed and frustrated by the executive and judicial departments of the State of Washington, and by the organized and vocal defiance of the commercial fishermen in the State of Washington, felt compelled to implement its judgment by the issuance of an injunction." (Op 1-2)

It is clear from the history of this litigation that the Washington state officals are responding in part to the demands of their vocal non-Indian constituencies. The justices of the Washington Supreme Court are also subject to the pressures of those same constituencies and just as in the desegregation cases, elected state officials, including judges, cannot be expected to carry out the law when that law is overwhelmingly unpopular with the vast majority of the voters of the state. Only the federal courts can provide such protection.

In spite of the bitterness of the controversy, all parties to the Columbia River litigation except Washington have found it possible to accept the legal principles laid down by the Court and in fact have entered into a compromise settlement which was embodied in the District Court's order of February 28, 1977. Such a solution is obviously preferable to continual lititation over these fishing rights. The four tribes

in United States v. Oregon, as well as the State of Oregon and the United States have worked long and hard to make this settlement work. To grant review of this decision which involves the Columbia River and upheld the compromise settlement would punish those who in good faith have attempted to follow the Courts' interpretation of law and to resolve their differences by negotiation while rewarding the state of Washington and non-Treaty fishers whose recalcitrance have gone to extraordinary lengths, including open criticism of the decision and the District Court by the Washington Attorney General's office and massive civil disobedience by non-Indian fishers in an attempt to circumvent the Court orders.

An examination of the questions presented in the Petition for Writ of Certiorari by the State of Washington (Pet. 4-5) makes it apparent that what Washington is asking is to have the basic legal principle underlying both United States v. Washington, supra and United States v. Oregon, supra reviewed by this Court in spite of the fact that both of those decisions have become final. The key question in both cases is the interpretation of the language of the Indian treaties reserving to the Tribes the right to fish off reservation at all usual and accustomed fishing grounds and station "in common with citizens". In 1976, when a full and complete record of the trial on that issue was available, this court denied certiorari in United States v. Washington. When the United states Court of Appeals for the Ninth Circuit affirmed

the fifty percent allocation formula for the Spring Chinook run in 1974, neither Oregon nor Washington sought review in this Court. While the allocation formula has been changed on the Columbia River as a result of the stipulated settlement, the Court interpretation of the treaty language is the basis for that settlement. For this Court to grant certiorari can only lead to a destruction of the peaceful solution achieved on the Columbia River and inspire Washington and the non-Indian fishers to continue to ignore the treaty rights of the Indian tribes.

CONCLUSION

The State of Washington and the non-Indian fishers have steadfastly refused to abide by the Court's decisions on treaty Indian fishing rights. Review of the history of Indian fishing rights cases in this Court as well as a review of the history of the present cases, shows Washington's steadfast intransigence.

Washington now asks this Court to review decisions that have become final years ago. This request should not be granted.

The Confederated Tribes of the Warm Springs Reservation of Oregon respectfully requests that the Application for Writ of Certiorari be denied.

DATED this 20th day of September, 1978.

PANNER, JOHNSON, MARCEAU,
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiffs, v. STATE OF OREGON, Defendant, and THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON; CONFEDERATED TRIBES & BANDS OF THE YAKIMA INDIAN NATION; CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION; and NEZ PERCE TRIBE OF IDAHO, Intervenors, STATE OF WASHINGTON,	CIVIL NO. 68-513 MOTION

Intervenor.)

All parties hereby move this Court for an Order approving the Plan for Managing Fisheries on Stocks Originating from the Columbia River and its Tributaries Above Bonneville Dam, which is attached hereto as Exhibit "A."

DATED February 28, 1977.

Respectfully submitted,

/s/ Beverly B. Hall
Beverly B. Hall
Assistant Attorney General
Attorney for Oregon Fish
and Wildlife Department

/s/ James M. Johnson
James M. Johnson
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/s/ Dennis Karnopp
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Tribe

/s/ Tim Weaver
Tim Weaver
Attorney for Yakima Indian
Nation

/s/ Robert C. Strom
Robert C. Strom
Of Attorneys for the Nez
Perce Tribe of Idaho

/s/ Douglas R. Nash
Douglas R. Nash
Attorney for Umatilla
Tribe

IT IS SO ORDERED.

/s/ ROBERT J. BELLONI
ROBERT J. BELLONI
United States District Judge

A PLAN FOR MANAGING FISHERIES ON STOCKS ORIGINATING FROM THE COLUMBIA RIVER AND ITS TRIBUTARIES ABOVE BONNEVILLE DAM

The purpose of the plan shall be to maintain, perpetuate and enhance anadromous fish and other fish stocks originating in the Columbia River and tributaties above Bonneville Dam for the benefit of present and future generations, and to insure that the Nez Perce Tribe of Idaho, Confederated Tribes of the Umatilla Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakima Indian Nation,

hereinafter called Tribes, having the right to fish based on a treaty with the United States are accorded the opportunity for their fair share of harvest, and to provide for a fair share of the harvest by nontreaty user groups.

This plan is based upon the unique circumstances relating to the Columbia River system and the parties hereto and does not necessarily have application in other fisheries.

The parties also recognize the substantial management problems resulting from the ocean harvest of mixed stocks of anadromous fish originating from the upper Columbia River and its tributaries and the wastage resulting from fishing on immature stocks. The parties will continue joint efforts to collect and gather data on this fishery and to reduce inefficient and wasteful harvest methods.

Due to the environmental factors totally unrelated to the treaty or nontreaty fisheries, there has been a continual decline of some runs of anadromous fish in the Columbia River system. This trend could deprive not only the treaty Indians, but also other user groups of the opportunity to harvest anadromous fish. The parties pledge to work cooperatively to maintain the present production of each run, rehabilitate runs to their maximum potential and to work towards the enhancement and development of larger and additional runs where biologically and economically feasible.

(1) The managing fishery agencies shall make every effort to allocate the available harvest as prescribed in this agreement on an annual basis. However, because run size cannot always be accurately calculated until some lower fishery has taken place, annual adjustment of the sharing formulas for each species may be required to provide the appropriate shares between treaty and nontreaty users. If treaty and nontreaty users are not provided the opportunity to harvest their fair share of any run as provided for in this plan, every effort shall be made to make up such deficiencies during the next succeeding run of the same race. Overall adjustments shall be made within a 5-year time frame.

(2) The treaty Indian tribes and state and federal agencies shall diligently pursue and promote through cooperative efforts the upriver maintenance and enhancement of fish habitat and hatchery rearing programs, and so far as practicable, maintain present productions of each run and to rehabilitate runs to their maximum potential.

(3) Hatchery salmon and steelhead released to maintain or restore runs above Bonneville Dam shall be shared pursuant to this plan.

(4) A technical advisory committee shall be established to develop and analyze data pertinent to this agreement, including but not limited to the following: calculated run size for all species of fish, ocean catches, escapement goals, catch allocation and adjust-

ments, dam loss, habitat restoration, and hatchery rearing programs. Such a committee shall make recommendations to the managing fishery agencies to assure that the allocating in this agreement are realized. Members shall be qualified fishery scientists familiar with technical management problems on the Columbia River. The committee shall be comprised of representatives named by each of the three states, Oregon, Washington, Idaho, National Marine Fisheries Service, U. S. Fish and Wildlife Service and each of the Indian Tribes.

(5) Each party shall develop a catch record program that utilizes reliable statistical methods and effective enforcement procedures as developed by the committee. Indian tribes shall report on appropriate state forms for each species ceremonial, subsistence and any other catch not sold to state-licensed buyers. The states shall report and make available to all interested parties treaty and nontreaty sport and commercial catch for each species. All the above reports shall be made within an agreed upon time schedule.

(6) The states agree to enact or recommend for enactment by the Pacific Fisheries Management Council appropriate conservation regulations for the ocean fishery that will assure an efficient utilization of stocks and will provide for adequate escapement of mature fish into the Columbia River to achieve the goals and purposes of this plan. Marine regulations should attempt to harvest mature fish and reduce waste.

(7) Fish escapement totals, dam loss estimates, or other technical aspects of this agreement may be modified by mutual agreement to reflect current data. In the event that significant management problems arise from this agreement that cannot be resolved by mutual agreement, the parties agree to submit the issues to federal court for determination. In any event, the Court shall retain jurisdiction over the case of U. S. v. Oregon, Civil 68-513, (D.C. Or).

(8) The sharing formulas as set forth in this plan are controlled upon the premise that the marine area catches in U. S. controlled waters of fish originating above Bonneville Dam, other than fall chinook and coho runs, will be regulated by PFMC so as to be essentially de minimis portions of those runs. The parties acknowledge that if subsequent data should indicate that this premise is incorrect, these formulas may require revision.

(9) Regulations affecting treaty users which are enacted in conformity with this comprehensive plan shall be considered as complying with the court's decrees enunciated in U. S. v. Oregon, Civil No. 68-513, District of Oregon.

(10) Tribal members fishing pursuant to this agreement may employ only members of the Tribes, while exercising their treaty fishing rights.

(11) All fish numbers referred to in this agreement are adult fish.

(12) The sharing formulas contained herein for determining the treaty fishery share refer to those fish caught in the Columbia River below McNary Dam and any other inland off-reservation catch placed in commercial channels.

Except as provided in subparagraph 5 under Spring Chinook, neither treaty nor nontreaty non-commercial harvest in tributaries, or in the mainstem Columbia River above McNary Dam, shall be considered in the sharing formulas contained herein.

(13) Upon thirty days written notice by any party, after five years from date, this comprehensive plan may be withdrawn or may be renegotiated to assure that the terms set forth represent current facts, court decisions, and laws.

Fish Management Plan

A fish management plan has been adopted for those species of importance to assure future conservation of the resource and equitable sharing of the harvest between treaty Indians and nontreaty users. The formulas represent Available Fish for Harvest and may not reflect total catch if fishing effort is inadequate to harvest all available fish. All runs of fish described in this plan are those originating in the area of the Columbia River or its tributaries above Bonneville Dam.

Fall Chinook Salmon

The Columbia River fall chinook shall be managed under the following plan:

(1) Run size shall be determined by the number of fish entering the Columbia River which are destined to pass Bonneville Dam.

(2) Escapement of 100,000 fish above Bonneville Dam shall be subtracted from total in-river run size.

(3) Additional fish above ascapement are available for harvest and shall be shared 60% by treaty fishermen and 40% by nontreaty fishermen.

(4) The states' goal is to manage the fisheries to provide and maintain a minimum average harvestable run size of 200,000 upriver fall chinook to the Columbia River.

(5) The 60% treaty share shall include mainstem ceremonial, subsistence, and commercial harvest as allocated by the Indian tribes. The 40% nontreaty share shall include in-river commercial and sport harvest as allocated by the appropriate agencies.

Spring Chinook

The Columbia River spring chinook shall be managed under the following plan:

(1) Run size shall be determined by the number of fish entering the Columbia River destined to pass Bonneville Dam.

(2) Spawning escapement goals shall be a minimum of 120,000 and 30,000 fish above Bonneville and Lower Granite Dams respectively.

(3) The states' goal is to manage the fisheries to provide and maintain a minimum average run size of 250,000 upriver spring chinook to the Columbia River.

(4) Treaty ceremonial and subsistence catch shall have first priority. The fisheries shall not exceed a catch of 2,000 fish on a run size of less than 100,000 fish; 5,000 on a run size of between 100,000 and 120,000 fish; and 7,500 fish on a run size of between 120,000 fish and 150,000 fish. Treaty ceremonial and subsistence fishing for spring Chinook with gillnets as well as other normal gear may occur, but such gillnet fishing shall be subject to a notification system similar to that presently used for ceremonial fishing. All catches shall be monitored cooperatively for the purpose of ascertaining the amount of the catch.

(5) On a run size of between 120,000 and 150,000 fish passing Bonneville Dam, the nontreaty fisheries are limited to the Snake River system and may harvest fish which are in excess of the 30,000 spawning escapement passing Lower Granite Dam. (Under average river flow conditions, 120,000 fish at Bonneville Dam will generally provide 30,000 fish at Lower Granite Dam and 150,000 fish at Bonneville Dam will generally provide 37,500 fish at Lower Granite Dam.

(6) On a run size of more than 150,000 fish passing Bonneville Dam, all allocations as provided for in items 4 and 5 shall occur. All additional fish

available for harvest below McNary Dam shall be shared 40 percent for treaty fishermen and 60 percent for nontreaty fishermen. If river passage conditions improve so as to provide more than 40,000 fish at Lower Granite Dam on run sizes of 150,000 fish or less, the 40 percent and 60 percent allocation may occur on a run size of less than 150,000 fish at Bonneville Dam.

Summer Chinook Salmon

Summer chinook salmon runs are precariously low and do not warrant any fishery at the present time, with the exception of a treaty subsistence, ceremonial, and incidental catch not to exceed 2,000 fish during the months of June and July.

The parties agree that if the run size increases a formula for sharing of the available harvest above present escapement goals for this race shall be similar to spring chinook.

Summer Steelhead

(1) Run size shall be determined by the number of fish entering the Columbia River destined to pass Bonneville Dam.

(2) The escapement goal to spawning grounds above lower Granite Dam shall be a minimum of 30,000 fish. A run size of 150,000 fish at Bonneville Dam will provide for 30,000 fish at Lower Granite Dam.

(3) The treaty Indian mainstem fishery shall be limited to ceremonial, subsistence and incidental catch to other commercial fisheries. A minimum mesh restriction of 8 inches will be utilized to limit incidental catch.

(4) The Indian tribes recognize the importance of the steelhead stocks to recreational users and agree to forego a target commercial fishery.

Sockeye Salmon

Sockeye salmon runs are precariously low and do not warrant any fishery at the present time, with the exception of a treaty subsistence, ceremonial, and incidental catch not to exceed 2,000 fish.

The parties agree that if the run size increases so as to provide harvestable quantities, such harvest shall be shared equally between treaty and nontreaty fishermen.

The parties recognize the importance of protecting summer chinook and summer steelhead stocks during the harvest of sockeye salmon. Incidental catch of summer chinook and steelhead shall be minimized by providing appropriate restrictions to the sockeye fishery.

Coho Salmon

Coho stock are in the treaty fishing area simultaneously with other species which currently need protection from fishing effort. Parties agree to use their best efforts to develop methods to

maximize coho harvest while protecting those other species.

Shad

Shad runs have been sufficiently large to allow for unlimited harvest. However, because shad fisheries can take stocks of salmon and steelhead that are below harvestable levels, new catch methods shall be pursued particularly by the Indians above Bonneville Dam to assure a sufficient catch of shad while minimizing the catch of other species. If escapement goals and catch formula must be established in the future, the committee shall compile the required data and make recommendations to the managing fisheries agencies.

Sturgeon

The population of sturgeon in the Columbia River appears residual above Bonneville Dam. The parties agree that the Indian tribes shall have a commercial fishery regulated by sound principles of conservation and wise use. A sport harvest may occur simultaneously for sturgeon above Bonneville Dam.

Winter Season

The treaty fishermen shall be allowed a mainstem commercial fishery for any species of fish between February 1, and April 1.

This comprehensive plan for managing anadromous fisheries on stocks originating from the Columbia River and its tributaries above Bonneville Dam is

adopted by the undersigned this 25th day of February, 1977.

/s/ Robert W. Straub
ROBERT W. STRAUB
Governor of Oregon

/s/ Dixy Lee Ray
DIXY LEE RAY
Governor of Washington

CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

/s/ Harold Culpus
HAROLD CULPUS

/s/ Watrum Totum
Watrum Totum
CONFEDERATED TRIBES & BANDS OF THE YAKIMA INDIAN NATION

/s/ Lylia Marthson
LYLIA MARTHSON
CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

/s/ Richard A. Halfmoon
RICHARD A. HALFMOON
CHAIRMAN, NEZ PERCE TRIBE OF IDAHO

/s/ Alta A. Guzman
ALTA A. GUZMAN, SECRETARY
NEZ PERCE TRIBE OF IDAHO